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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF LOS ANGELES

10 CENTRAL DISTRICT
11
12

13 **EXIDE TECHNOLOGIES, INC. a**
Delaware corporation,

14 Plaintiff,

15 v.
16

17 **DEPARTMENT OF TOXIC**
SUBSTANCES CONTROL, a public agency
18 **of the State of California,**

19 Defendant and Respondent.
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Case No. BS143369

**RESPONSE OF DEFENDANT AND
RESPONDENT DEPARTMENT OF
TOXIC SUBSTANCES CONTROL TO
ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION**

Date: July 2, 2013
Time: 9:30 a.m.
Dept: 82
Judge: The Honorable Luis A. Lavin
Trial Date: Not set
Action Filed: June 13, 2013

TABLE OF CONTENTS

	Page
Introduction	1
Factual background	2
I. Exide operates a hazardous waste facility in Vernon.....	2
II. Exide's badly damaged stormwater pipes threaten to pollute the environment.....	3
III. Air emissions from Exide's operations threaten public health.	4
IV. DTSC responded to these threats by temporarily suspending Exide's authorization to operate.....	5
Argument	6
I. There is cause not to grant a preliminary injunction.....	6
A. It is not reasonably probable that Exide will prevail on the merits.....	6
1. DTSC may declare an "imminent and substantial danger" under section 25186.2 at any point in a chain of events which may ultimately result in harm to the public or the environment.....	6
2. DTSC's temporary suspension order is necessary to prevent or mitigate an imminent and substantial danger to public health, safety, and the environment.....	8
3. The short time between DTSC's receipt of data and its order does not undermine the order.....	9
4. Exide's preliminary emissions data from April 2013 does not justify staying DTSC's temporary suspension order.	9
5. DTSC's treatment of a one in a million cancer risk as de minimis is not an underground regulation, and does not affect the order's validity.	10
B. The Court may not grant injunctive relief to prevent execution of a public statute for the public benefit.....	11
C. The Court should reconsider its finding that the doctrine of exhaustion of administrative remedies does not bar Exide's case.	12
II. If the Court grants a preliminary injunction, it should impose conditions to reduce the risk of harm and require Exide to post a \$100,000 undertaking.....	13
A. Any preliminary injunction should include conditions to protect public health, safety, and the environment.	13
B. The court should require Exide to post a \$100,000 undertaking.	14
Conclusion	14

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

<i>Abba Rubber Co. v. Seaquist</i> (1991) 235 Cal.App.3d 1.....	14
<i>Abelleira v. District Court of Appeal</i> (1941) 17 Cal.2d 280	12
<i>Alfaro v. Terhune</i> (2002) 98 Cal.App.4th 492	12
<i>Bollengier v. Doctors Medical Center</i> (1990) 222 Cal.App.3d 1115.....	12
<i>California Dept. of Toxic Substances Control v. Interstate Non-Ferrous Corp.</i> (E.D. Cal. 2003) 298 F.Supp.2d 930.....	8
<i>County of Inyo v. City of Los Angeles</i> (1976) 61 Cal.App.3d 91.....	13
<i>Cox v. City of Dallas</i> (5th Cir. 2001) 256 F.3d 281.....	7
<i>Daugherty v. Superior Court</i> (1937) 23 Cal.App.2d 739.....	11, 12
<i>Johnson v. City of Loma Linda</i> 24 Cal.4th 61	12
<i>Lincoln Properties, Ltd. v. Higgins</i> (E.D. Cal. Jan 21, 1993) 1993 WL 217429.....	7, 8
<i>Meghrig v. KFC Western, Inc.</i> (1996) 516 U.S. 479.....	7
<i>O'Connell v. Superior Court</i> (2006) 141 Cal.App.4th 1452	6
<i>Price v. United States Navy</i> (9th Cir. 1994) 39 F.3d 1011.....	7
<i>San Francisco Newspaper Printing Co., Inc. v. Superior Court</i> (1985) 170 Cal.App.3d 438.....	6

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
<i>Sullins v. Exxon/Mobil Corp.</i> (N.D. Cal. 2010) 729 F.Supp.2d 1129	7
<i>Tidewater Marine Western, Inc. v. Bradshaw</i> (1996) 14 Cal.4th 557	10, 11
STATUTES	
42 U.S.C. § 6901 et seq.....	3
42 U.S.C. § 6972.....	7
Civ. Code, § 3423	1, 11, 12
Code Civ. Proc.,	
§ 526.....	1, 11, 12
§ 529.....	14
Health & Saf. Code, div. 20, ch. 6.5	3, 7
Health & Saf. Code,	
§ 25100 et seq.	3
§ 25101.....	3
§ 25117.....	3
§ 25117.1.....	3
§ 25141.....	3
§ 25159.....	3
§ 25186.2.....	passim
§ 25200.....	3
§ 25200.5.....	3
OTHER AUTHORITIES	
Cal. Code Regs., tit. 22, § 66264.192	4

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
California; Final Authorization of State Hazardous Waste Management Program, 57 Fed. Reg. 32726 (July 23, 1992)	3
Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) § 9:648	13

INTRODUCTION

The Department of Toxic Substances Control (DTSC) learned in March 2013 that Exide Technologies, Inc. (Exide) was threatening to pollute the environment with lead and other hazardous metals through broken underground stormwater pipes, and threatening public health with air emissions of high levels of arsenic and other hazardous chemicals from its lead battery recycling operations in Vernon, California. Acting on these threats, DTSC issued an order in April temporarily suspending Exide Technologies, Inc.'s (Exide's) interim status authorization to conduct hazardous waste operations at its facility. The Court has directed DTSC to show cause why the Court should not grant a preliminary injunction staying DTSC's order.

There is cause not to grant a preliminary injunction because DTSC's temporary suspension order is "necessary to prevent or mitigate an imminent and substantial danger to public health or safety or the environment." (Health & Saf. Code, § 25186.2.)¹ That imminent and substantial danger is the serious environmental threat from Exide's use of broken stormwater pipes to carry hazardous stormwater and other facility runoff, and the serious public health threats from Exide's air emissions of large amounts of arsenic and other hazardous metals and chemicals from its operations. An "imminent and substantial danger" under section 25186.2 requires a present *threat* of substantial harm, not that actual harm will occur immediately. DTSC's evidence in support of this response demonstrates that DTSC's temporary suspension order was necessary to prevent or mitigate such threats. Therefore, it is not reasonably probable that Exide will prevail on the merits, and the Court may not issue a preliminary injunction.

There is also cause not to grant a preliminary injunction because it would impermissibly "prevent the execution of a public statute by officers of the law for the public benefit." (Code Civ. Proc., § 526, subd. (b)(4); Civ. Code, § 3423, subd. (d).) DTSC made this argument when opposing the order to show cause, and the Court has not yet addressed it; DTSC renews the argument here. In issuing the temporary suspension order, DTSC executed a public statute (§ 25186.2) for the public benefit; specifically, the protection of public health, safety, and the

¹ All future statutory references are to the Health and Safety Code unless otherwise indicated.

1 environment. The Court may not grant injunctive relief to prevent DTSC's execution of that
2 public statute. Exide's judicial remedy regarding DTSC's temporary suspension order is a
3 petition for administrative mandamus challenging the final administrative decision on the merits,
4 not a preliminary injunction staying DTSC's order before that final decision.

5 In addition, there is cause not to grant a preliminary injunction under the doctrine of
6 exhaustion of administrative remedies. The Court found that the doctrine did not bar Exide's case
7 when issuing the order to show cause, but the Court should reconsider that finding now. Exide
8 has still not made a motion or other application to the Office of Administrative Hearings to
9 expedite completion of the administrative process, and the delay in resolving the administrative
10 proceeding is largely of Exide's own making.

11 The above justifies discharging the order to show cause and denying Exide a preliminary
12 injunction. But if the Court does grant a preliminary injunction, it should condition that
13 injunction on Exide not using its stormwater pipes until Exide has fixed them, and on Exide
14 demonstrating – with comprehensive data, not merely preliminary results – that Exide's alleged
15 fixes for its excessive hazardous air emissions actually work. The Court should also require
16 Exide to post a \$100,000 undertaking to cover attorney's fees and expenses that DTSC may
17 sustain by reason of the preliminary injunction, if the Court finally decides that Exide was not
18 entitled to it.

19 **FACTUAL BACKGROUND**

20 **I. EXIDE OPERATES A HAZARDOUS WASTE FACILITY IN VERNON.**

21 Exide recycles used lead acid batteries and other lead products as part of Exide's
22 nationwide battery manufacturing business. One of Exide's several recycling facilities is in
23 Vernon, California. Exide receives spent lead acid batteries and other lead bearing materials at its
24 Vernon facility and recycles them to recover lead and polypropylene (from plastic battery
25 casings). According to Exide, it recycles between 20,000 and 40,000 batteries per day at the
26 Vernon facility. (Exide Appen. of Declarations, Preuth Decl., p. 2, ¶ 4.)

27 As part of its operations, Exide generates, receives, treats, and stores large amounts of
28 hazardous wastes, including lead and sulfuric acid in spent batteries, and waste arsenic from its

1 lead smelting operations. In general terms, “hazardous wastes” are those wastes, as designated in
2 DTSC regulations, that may cause illness or pose a substantial hazard to human health or the
3 environment. (§§ 25117, 25141.)

4 Given the risks associated with hazardous wastes, Chapter 6.5 of Division 20 of the Health
5 and Safety Code (Chapter 6.5) regulates those wastes from creation through disposal, that is, from
6 “cradle to grave.” (See § 25100 et seq.) Chapter 6.5 is the California analog of the federal
7 Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., and governs the
8 generation, transport, treatment, storage, recycling, and disposal of hazardous waste. (§ 25100 et
9 seq.) DTSC is the state agency that administers Chapter 6.5 in lieu of RCRA in California. (See
10 § 25101, subd. (d); § 25159; California; Final Authorization of State Hazardous Waste
11 Management Program, 57 Fed. Reg. 32726 (July 23, 1992).)

12 DTSC’s permitting and enforcement authority under Chapter 6.5 applies to “hazardous
13 waste facilit[ies]” in California, which are facilities “used for the treatment, transfer, storage,
14 resource recovery, disposal, or recycling of hazardous waste.” (§ 25117.1.) Exide is such a
15 hazardous waste facility, and therefore must have a hazardous waste permit or other form of
16 authorization from DTSC. Exide currently operates under an “interim status” authorization – i.e.
17 an interim permit – from DTSC. (See § 25200.5.) Exide has applied to DTSC to replace that
18 interim authorization with a regular hazardous waste facility permit. (See § 25200.)

19 **II. EXIDE’S BADLY DAMAGED STORMWATER PIPES THREATEN TO POLLUTE THE** 20 **ENVIRONMENT.**

21 While reviewing Exide’s application in 2010 for a regular hazardous waste facility permit,
22 DTSC determined that an underground pipe system at the Vernon facility needed to be included
23 in the permit process. The underground pipes carry stormwater and other facility runoff
24 containing lead and other hazardous metals that Exide’s operations deposit on the ground. The
25 pipes lead to an on-site wastewater treatment system, which treats the metal-contaminated water
26 and discharges it to the Los Angeles County storm sewer. That treatment system is one of the
27 “hazardous waste management units” that DTSC regulates. (See § 25200, subd. (a).)

1 DTSC directed Exide to assess the condition of the pipes to determine whether the pipes
2 should be used as part of a hazardous waste management unit. Exide assessed the pipes between
3 August and December 2012, but did not provide a report of that work to DTSC until March 5,
4 2013. (Exide Appen. of Declarations, Stratman Decl., p. 10, ¶ 32.) The report included several
5 hours of videos of the insides of the pipes. DTSC staff finished reviewing the report and videos
6 on April 4, 2013. (DTSC Appen. of Declarations, Ghazi Decl., p. 3, ¶ 11 (Ghazi Decl.).)

7 The report and videos demonstrated that the pipes are severely damaged, with multiple pipe
8 breaches, severe sagging, pipe leakage (with constant dripping), and segments where the pipes'
9 fiberglass slip linings are scaling, fraying, or non-existent. (See Ghazi Decl., at pp. 3-4, ¶¶ 11-
10 13.)² The report also showed that the pipes had no secondary containment to prevent releases of
11 hazardous waste into the environment, as required by DTSC regulations. (Cal. Code Regs., tit.
12 22, § 66264.192, subd. (1)(7).) Exide's report also did not include any leak testing data,
13 presumably because Exide knew the existing breaches would cause the pipes to fail any leak test.
14 (See Ghazi Decl., at p. 4, ¶ 14,)

15 Exide's report included a proposal for replacing or abandoning the pipes, but that schedule
16 extended "over a four year period." (Exide Appen. of Evid. Exh. S., p. 5-5; see also Ghazi Decl.,
17 at p. 5, ¶ 14.) In the meantime, Exide would keep using the broken pipes as part of its hazardous
18 waste operations.

19 **III. AIR EMISSIONS FROM EXIDE'S OPERATIONS THREATEN PUBLIC HEALTH.**

20 Four days earlier on March 1, 2013, DTSC received notice that SCAQMD had accepted as
21 final an Exide health risk assessment (HRA) concerning Exide's operations. (Exide Appen. of
22 Evidence, Exh. G.) That HRA showed that Exide's hazardous air emissions and associated health
23 risks – primarily from arsenic – were unacceptably high for its employees and surrounding
24 residents, "impacting as many as 110,000 residents in a large geographical area that includes
25 portions of Vernon, Maywood, Huntington Park, Commerce, Boyle Heights and unincorporated

26
27 ² See also <http://dtsc.ca.gov/HazardousWaste/Projects/UpdateExideSuspension.cfm>
28 (providing a YouTube link to an excerpt of the pipe inspection videos that was admitted in
evidence in the underlying administrative hearing).

1 areas of east Los Angeles.” (*Id.*, Exh. Q, ¶ 18 [DTSC order]; see also *id.*, Exh. G; DTSC Appen.
2 of Declarations, Bosan Decl., pp. 4-5, ¶¶ 14-16, 18 (Bosan Decl.).) The elevated cancer risk from
3 arsenic to offsite workers was 156 in one million, (Exide Appen. of Evidence, Exh. G, p. KK.001),
4 which is 156 times what is generally considered de minimis (the so-called “one in a million” or
5 “ 1×10^{-6} ” risk). (See Bosan Decl., at p. 3, ¶ 10.) DTSC considers a one in a million risk de
6 minimis at hazardous waste facilities, but it is not a pass or fail measure; DTSC can and does give
7 permits to hazardous waste facilities exceeding that risk value on a case by case basis, as long as
8 facility owners or operators have taken all feasible actions to minimize the health risks from their
9 operations. (*Ibid.*)

10 The HRA that SCAQMD accepted as final on March 1, 2013 remains the only accepted risk
11 assessment for the Exide facility. Exide has submitted preliminary data regarding alleged
12 emissions reductions after its installation of an “isolation door” on one of its furnaces, but as
13 preliminary data, it does not supersede the HRA. (Bosan Decl., at p. 6, ¶ 20.) Exide submitted
14 that preliminary data on May 2, 2013 – more than a week *after* DTSC issued its temporary
15 suspension order. (Exide Appen. of Evidence, Exh. T.)

16 **IV. DTSC RESPONDED TO THESE THREATS BY TEMPORARILY SUSPENDING EXIDE’S**
17 **AUTHORIZATION TO OPERATE.**

18 In response to the pipe inspection report and HRA, DTSC issued an order temporarily
19 suspending Exide’s interim status authorization. (Exide Appen. of Evidence, Exh. Q, ¶ 20
20 [DTSC order]; see also § 25186.2.) DTSC did so based on its determination that the action was
21 “necessary to prevent or mitigate an imminent and substantial danger to the public health or
22 safety or the environment.” (*Ibid.*) The effect of the April 24, 2013 order was to require Exide to
23 suspend most operations at its Vernon facility immediately.

24 Exide invoked its statutory administrative remedy by submitting a notice of defense to
25 DTSC on May 6, 2013. (§ 25186.2.) DTSC submitted the notice to the Office of Administrative
26 Hearings (OAH), which scheduled and held a three-day administrative hearing on June 3-5, 2013,
27 within the required thirty days of Exide’s notice. (*Ibid.*) Exide agreed to those dates. DTSC
28 presented its supporting witnesses and other evidence in under two days and rested its case.

1 Exide began presenting its own witnesses and evidence on the third day, but at the end of that day
2 asked for two or three more hearing days to present the testimony of three or four additional
3 witnesses. OAH has ordered a conference for July 2, 2013 to schedule those hearing days.

4 After moving the administrative law judge unsuccessfully to stay DTSC's order, Exide filed
5 this action on June 13, 2013, seeking: (1) provisional and permanent injunctive relief "staying or
6 setting aside the DTSC's Suspension Order;" (2) a peremptory writ of mandate "commanding
7 DTSC to stay the Suspension Order" until it is final on the merits; (3) a declaration that DTSC
8 "may not apply its 1×10^{-6} cancer risk standard to Exide"; and (4) attorney's fees, expenses, and
9 costs. (Complaint (June 13, 2013), pp. 19-20.) On June 17, 2013, the Court issued a temporary
10 restraining order staying DTSC's order, and an order to show cause why the Court should not
11 issue a preliminary injunction to continue that stay.

12 ARGUMENT

13 I. THERE IS CAUSE NOT TO GRANT A PRELIMINARY INJUNCTION.

14 A. It is not reasonably probable that Exide will prevail on the merits.

15 A court may not issue a preliminary injunction unless it is "reasonably probable that the
16 moving party will prevail on the merits [citations]" (*San Francisco Newspaper Printing Co.,*
17 *Inc. v. Superior Court* (1985) 170 Cal.App.3d 438, 442.) The burden is on Exide to show that it
18 is reasonably probable it will prevail. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452,
19 1481.) Here, the order to show cause and temporary restraining order includes a finding that
20 DTSC "will be unlikely to ultimately prevail on the merits." (Order (June 17, 2013), p. 2.) But
21 the evidence included with this response indicates that Exide, not DTSC, is unlikely to ultimately
22 prevail.

23 1. DTSC may declare an "imminent and substantial danger" under 24 section 25186.2 at any point in a chain of events which may ultimately 25 result in harm to the public or the environment.

26 DTSC issued its temporary suspension order under section 25186.2, which authorizes such
27 an order where "necessary to prevent or mitigate an imminent and substantial danger to the public
28 health or safety or the environment." (§ 25186.2.) The statute does not define "imminent and
substantial danger," and no state appellate court has construed that phrase in the statute. But

1 RCRA similarly references “imminent and substantial endangerment,” (42 U.S.C. §
2 6972(a)(1)(B)), and section 25186.2 is part of Chapter 6.5, which California enforces in lieu of
3 RCRA. (See *supra* at p. 3.) Therefore, federal cases interpreting “imminent and substantial
4 endangerment” under RCRA help interpret “imminent and substantial danger” under section
5 25186.2.

6 As used in RCRA, “‘endangerment’ means a threatened or potential harm and does not
7 require proof of actual harm. [Citation.]” (*Lincoln Properties, Ltd. v. Higgins* (E.D. Cal. Jan 21,
8 1993) 1993 WL 217429, at p. *12.) “‘Case law and dictionary definition agree that endanger
9 means something less than actual harm. When one is endangered, harm is *threatened*; no actual
10 injury need ever occur.’ [Citation.]” (*Ibid.*, italics in original.)

11 As to the term “imminent” in RCRA, “[a]n endangerment can only be ‘imminent’ if it
12 ‘threatens to occur immediately,’ [citation]” (*Meghrig v. KFC Western, Inc.* (1996) 516 U.S.
13 479, 485.) But “[a] finding of ‘imminency’ does not require a showing that actual harm will
14 occur immediately so long as the risk of threatened harm is present: ‘An “imminent hazard” may
15 be declared at any point in a chain of events which may ultimately result in harm to the public.’
16 [Citation.]” (*Price v. United States Navy* (9th Cir. 1994) 39 F.3d 1011, 1019; see also *Sullins v.*
17 *Exxon/Mobil Corp.* (N.D. Cal. 2010) 729 F.Supp.2d 1129, 1135-36.) “The RCRA provision
18 implies that there must be a threat which is present *now*, although the impact of the threat may not
19 be felt until later.” (*Price v. United States Navy, supra*, 39 F.3d at p. 1019, italics in original; see
20 also *Meghrig v. KFC Western, Inc., supra*, 516 U.S. at p. 486.) “An endangerment is ‘imminent’
21 if factors giving rise to it are present, even though the harm may not be realized for years.
22 [Citation.]” (*Lincoln Properties, Ltd. v. Higgins, supra*, 1993 WL 217429, at p. *13.)

23 Lastly, “an endangerment is ‘substantial’ if it is ‘serious.’” (*Cox v. City of Dallas* (5th Cir.
24 2001) 256 F.3d 281, 300 [citing *Price v. United States Navy, supra*, 39 F.3d at p. 1019].) This
25 standard is met “‘if there is some reasonable cause for concern that someone or something may be
26 exposed to a risk of harm ... if remedial action is not taken.’ [Citation.]” (*Lincoln Properties,*
27 *Ltd. v. Higgins, supra*, 1993 WL 217429, at p. *13.) “[T]he word ‘substantial’ ‘does not require
28 quantification of the endangerment (e.g., proof that a certain number of persons will be exposed,

1 that “excess deaths” will occur, or that a water supply will be contaminated to a specific
2 degree)....’ [Citation.]” (*Ibid.*; see also *California Dept. of Toxic Substances Control v.*
3 *Interstate Non-Ferrous Corp.* (E.D. Cal. 2003) 298 F.Supp.2d 930, 980.)

4 **2. DTSC’s temporary suspension order is necessary to prevent or**
5 **mitigate an imminent and substantial danger to public health, safety,**
6 **and the environment.**

7 The evidence included with this response shows that DTSC’s temporary suspension order is
8 necessary to prevent or mitigate such an “imminent and substantial danger” under section
9 25186.2. That danger comes from Exide’s use of its severely damaged pipes to carry stormwater
10 and other facility runoff contaminated with lead and other hazardous metals, and from Exide’s
11 unacceptably high and widespread hazardous air emissions.

12 Regarding Exide’s damaged pipes, DTSC’s permitting chief, Rizgar Ghazi, declares that
13 the degraded and compromised physical condition of the piping system presents a continuous
14 threat of releases to the environment of hazardous waste-containing water, and actually causes
15 such releases on a regular basis. (Ghazi Decl, at p. 5, ¶ 16.) Mr. Ghazi further declares that these
16 hazardous waste releases to the environment present a serious threat of additional soil and
17 groundwater underlying the facility, which is already contaminated. (*Ibid.*) Mr. Ghazi also notes
18 that groundwater in the area underlying the facility is already above maximum contaminant levels
19 for drinking water, thereby increasing the urgency with which any sources of contamination must
20 be curtailed and remediated to minimize further deleterious impacts to the state’s drinking water
21 supplies. (*Ibid.*)

22 Regarding Exide’s air emissions, DTSC Senior Toxicologist, William Bosan, Ph.D,
23 declares that the Exide facility emissions present an imminent and substantial danger to the public
24 health of the surrounding community, requiring immediate action. (Bosan Decl., at pp. 3-4, ¶¶
25 12-16.) This is based on multiple risk values described in the HRA, including the “clearly ...
26 unacceptable” maximum individual cancer risk, and elevated acute and chronic hazard index (HI)
27 values. (*Id.*, at p. 4, ¶ 14.) These unacceptable risks and hazards were based on emission data
28 averaged from 2010 and 2012 source tests. Consequently, receptors in the community

1 surrounding the facility have been exposed to unacceptable emissions for three years. (*Id.*, at p. 4,
2 ¶ 15.)

3 **3. The short time between DTSC's receipt of data and its order does not**
4 **undermine the order.**

5 At the hearing on the order to show cause and temporary restraining order, the Court asked
6 "why [DTSC] wait[ed] [between] March 5th [when it received the pipe inspection report] and
7 April 24th [when it issued the order] if the public's health was really in imminent and substantial
8 danger of being affected" (Transcript (June 17, 2013), p. 5:19-23.) Notably, Exide waited
9 exactly the same amount of time – fifty days – after April 24th to file this case. Fifty days was not
10 an unreasonable period of time for DTSC to take to issue the order. DTSC did not take its action
11 lightly, recognizing that the order would largely shut down Exide's Vernon facility, affecting
12 numerous workers and their jobs. Therefore, DTSC took the time necessary to review carefully
13 the nature of the threats and the necessary response to them. That review involved engineering
14 and toxicology evaluation of Exide's data, consideration of environmental and public health
15 impacts, and assessment of whether a temporary suspension order was necessary and appropriate.
16 Careful completion of those tasks took time, and DTSC moved promptly to complete its review
17 and issue the order.

18 **4. Exide's preliminary emissions data from April 2013 does not justify**
19 **staying DTSC's temporary suspension order.**

20 Throughout its application, Exide asserts that it has made improvements in its hazardous air
21 emissions over what is reported in its March 2013 HRA, and that data from Exide's testing in
22 April 2013 evidences that it has fixed its excessive hazardous air emissions. Based on that April
23 2013 data, Exide also asserts that it is being treated differently than its competitor Quemetco,
24 because Exide's April 2013 data allegedly shows that Exide's operations pose a lesser cancer risk
25 than Quemetco's operations. But Exide's data from April 2013 is only preliminary, and does not
26 supersede the HRA. (Bosan Decl., at p. 6, ¶ 20.) Indeed, SCAQMD stated that the data "can't be
27 considered as establishing the degree of arsenic emission reductions that will occur during normal
28 full capacity operations." (Exide Appen. of Evidence, Exh. I, at pp. AAA.001-002; see also

1 DTSC Appen. of Declarations, Fine Decl., p. 2, ¶ 4 [confirming SCAQMD statements re
2 preliminary nature of Exide's data].)

3 The Court should not rely on Exide's preliminary data as a basis for staying DTSC's order.
4 That preliminary data also does not show that DTSC is treating Exide differently than its
5 competitor Quemetco. Quemetco's risk data is not preliminary, and unlike Exide, Quemetco
6 installed best available control technologies to reduce the health risks from its operations in order
7 to obtain its hazardous waste facility permit. (Ghazi Decl., at pp. 5-6, ¶ 17.)

8 **5. DTSC's treatment of a one in a million cancer risk as de minimis is**
9 **not an underground regulation, and does not affect the order's**
10 **validity.**

11 Repeatedly in its pleadings, Exide refers to DTSC's practice of considering a cancer risk of
12 one in a million as de minimis as a void underground regulation not adopted under the
13 Administrative Procedure Act (APA). In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14
14 Cal.4th 557 (*Tidewater*), the California Supreme Court stated that "[a] regulation subject to the
15 APA thus has two principal identifying characteristics. [Citation.] First, the agency must intend
16 its rule to apply generally, rather than in a specific case. The rule need not, however, apply
17 universally; a rule applies generally so long as it declares how a certain class of cases will be
18 decided. [Citation.] Second, the rule must 'implement, interpret, or make specific the law
19 enforced or administered by [the agency], or ... govern [the agency's] procedure.' [Citation.]"
(*Tidewater*, *supra*, 14 Cal.4th at p. 571.)

20 DTSC's consideration of a one in a million cancer risk as de minimis is not an underground
21 regulation. This risk value is not a pass or fail measure; DTSC can and does give permits to
22 hazardous waste facilities exceeding that risk value on a case by case basis, as long as facility
23 owners or operators have taken all feasible actions to minimize the health risks from their
24 operations. (Bosan Decl., at p. 3, ¶ 10.) Thus, the risk value does not implement, interpret, or
25 make specific any law about when a hazardous waste facility can or cannot operate, or about
26 when a facility does or does not pose an imminent and substantial danger to public health, safety,
27 or the environment. Moreover, the excess cancer risk of 156 in one million from Exide's
28 operations far exceeds this one in a million risk value.

1 Furthermore, even if DTSC's consideration of a one in a million cancer risk as de minimis
2 were an underground regulation, that would not justify a preliminary injunction staying DTSC's
3 temporary suspension order. In *Tidewater*, the California Supreme Court disregarded a void
4 policy of the Division of Labor Standards Enforcement (DLSE) interpreting wage orders of the
5 Industrial Welfare Commission and independently determined whether the wage orders applied to
6 certain activities, concluding that "[c]ourts must enforce those wage orders just as they would if
7 the DLSE had never adopted its policy." (*Tidewater, supra*, 14 Cal.4th at p. 577.) Similarly here,
8 the Court must enforce section 25186.2 and evaluate whether DTSC's order is necessary to
9 protect public health and the environment, regardless of Exide's allegations that DTSC is
10 applying an underground regulation (which it is not).

11 **B. The Court may not grant injunctive relief to prevent execution of a public**
12 **statute for the public benefit.**

13 There is also cause not to grant a preliminary injunction because Exide's application
14 requests injunctive relief "[t]o prevent the execution of a public statute by officers of the law for
15 the public benefit," which the Court may not grant. (Code Civ. Proc., § 526, subd. (b)(4); Civ.
16 Code, § 3423, subd. (d).) DTSC made this argument in opposition to the order to show cause,
17 and the Court has not yet addressed it; DTSC renews the same argument here. In issuing its
18 temporary suspension order, DTSC executed a public statute (§ 25186.2) for the public benefit;
19 specifically, the protection of public health, safety, and the environment. DTSC received
20 evidence from Exide itself that part of Exide's hazardous waste management system – pipes that
21 carry contaminated stormwater and other facility runoff (for example, from washing down the
22 facility to control lead dust) – is broken, leaking, sagging, and unsafe. DTSC also received
23 evidence that hazardous air emissions from Exide's operations create unacceptable health risks
24 for its employees and as many as 110,000 residents who live in a large geographical area around
25 Exide's facility.

26 In *Daugherty v. Superior Court* (1937) 23 Cal.App.2d 739, the Commissioner of
27 Corporations ordered a broker and his company to show cause why a broker's certificate issued to
28 them should not be revoked. The broker and his company surrendered the certificate and then

1 brought an action to restrain the Commissioner from holding a hearing on the order to show cause.
2 The appellate court held that the lower court had no power to grant an injunction to stop the
3 hearing, because the Commissioner's revocation proceeding "was clearly one in execution of a
4 valid public statute for the public benefit. (Civ. Code, sec. 3423; Code Civ. Proc., sec. 526.)"
5 (*Daugherty v. Superior Court, supra*, 23 Cal.App.2d at p. 742.)

6 Similarly here, the Court may not grant injunctive relief staying DTSC's temporary
7 suspension order in execution of a valid public statute for the public benefit. (Code Civ. Proc., §
8 526, subd. (b)(4); Civ. Code, § 3423, subd. (d).)³ Exide's judicial remedy regarding DTSC's
9 order is a petition for administrative mandamus challenging the final administrative decision on
10 the merits, not a preliminary injunction staying DTSC's order before that final decision.

11 **C. The Court should reconsider its finding that the doctrine of exhaustion of**
12 **administrative remedies does not bar Exide's case.**

13 The Court should also reconsider its finding that the doctrine of exhaustion of
14 administrative remedies does not bar Exide's case. "[W]here an administrative remedy is
15 provided by statute, relief must be sought from the administrative body and this remedy
16 exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280,
17 292.) This requirement to exhaust a statutory administrative remedy requires a party to "go
18 through *the entire proceeding* to a "*final decision on the merits of the entire controversy*" before
19 resorting to the courts for relief." [Citation.]" (*Bollengier v. Doctors Medical Center* (1990) 222
20 Cal.App.3d 1115, 1125, italics in original.) Exhaustion of a statutory administrative remedy is
21 "a jurisdictional prerequisite to resort to the courts." [Citation.]" (*Johnson v. City of Loma Linda*
22 24 Cal.4th 61, 70.) "Until [an] administrative procedure has been invoked and completed, there is
23 nothing that the ... court may review; it cannot interfere in the intermediate stages of the
24 proceeding." (*Abelleira v. District Court of Appeal, supra*, 17 Cal.2d at p. 291.)

25
26 ³ The exceptions to this rule – "(1) where the statute is unconstitutional and there is a
27 showing of irreparable injury; (2) where the statute is valid but is enforced in an unconstitutional
28 manner; (3) where the statute is valid but, as construed, does not apply to the plaintiff; and (4)
where the public official's action exceeds his or her authority. [Citation.]" – are inapplicable here.
(*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 501.)

1 In this case, there is a statutory administrative remedy (§ 25186.2), and Exide invoked it.
2 But Exide has not gone through the entire administrative proceeding to a final decision on the
3 merits. Instead, the administrative proceeding is still ongoing after three days of hearing before
4 OAH, with Exide itself requesting two or three more days of hearing to present testimony from
5 three or four more witnesses. (Exide Appen. of Evidence, Exh. BB, at pp. 191:8-192:18.) There
6 is no final decision on the merits of DTSC's order. Thus, Exide has not satisfied a jurisdictional
7 prerequisite to its application for injunctive relief to this Court.

8 The Court's temporary restraining order and order to show cause includes a finding that
9 Exide's administrative remedy is too slow to be effective and/or would result in irreparable injury.
10 But the statute affords Exide a prompt administrative remedy, and the administrative hearing
11 would already be over absent Exide's own request that it continue. DTSC already presented all of
12 its witnesses and evidence, and Exide already had time to do the same. Furthermore, Exide still
13 has not moved OAH to expedite the setting of the additional hearing days that Exide says it needs.
14 Thus, Exide has not made every effort to complete the administrative process, and the Court
15 should reconsider its finding that Exide can proceed with this case before completing that process.

16 **II. IF THE COURT GRANTS A PRELIMINARY INJUNCTION, IT SHOULD IMPOSE**
17 **CONDITIONS TO REDUCE THE RISK OF HARM AND REQUIRE EXIDE TO POST A**
18 **\$100,000 UNDERTAKING.**

19 **A. Any preliminary injunction should include conditions to protect public**
20 **health, safety, and the environment.**

21 "A court may issue a preliminary injunction upon conditions that protect all – including the
22 public – whose interest the injunction may effect." (Weil & Brown, Cal. Practice Guide: Civil
23 Procedure Before Trial (The Rutter Group 2012) § 9:648, p. 9(II)-38 (rev. #1, 2012); see also
24 *County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91, 100.) Here, if the Court grants a
25 preliminary injunction, it should condition that injunction on Exide not using its stormwater pipes
26 until Exide has fixed them, and on Exide demonstrating – with comprehensive data, not merely
27 preliminary results – that Exide's alleged fixes for its excessive hazardous air emissions actually
28 work. Exide should not be allowed to use broken pipes to carry water laden with hazardous
metals to its wastewater treatment system during the pendency of the case. The Court should also

1 not grant a preliminary injunction without requiring Exide to produce acceptable data ensuring
2 that Exide's air emissions are safe.

3 **B. The Court should require Exide to post a \$100,000 undertaking.**

4 In addition, if the Court grants a preliminary injunction, it "must require an undertaking on
5 the part of the applicant to the effect that the applicant will pay to the party enjoined any damages,
6 not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the
7 court finally decides that the applicant was not entitled to the injunction." (Code Civ. Proc., §
8 529, subd. (a).) The likelihood of Exide prevailing on the merits is irrelevant in fixing the bond
9 amount. (*Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 16, fn. 8.) All reasonably
10 foreseeable damages that may be proximately caused by the preliminary injunction should be
11 considered, including "the attorney's fees and expenses to be incurred in either prosecuting an
12 appeal of the preliminary injunction, or defending at trial against those causes of action upon
13 which the preliminary injunctive relief had been granted." (*Id.*, at p. 16.)

14 DTSC requests an undertaking of \$100,000, as a reasonable estimate of the attorney's fees
15 and expenses that DTSC may incur in either prosecuting an appeal of the preliminary injunction,
16 or defending against Exide's complaint at trial. Exide's case raises complex technical and legal
17 issues that will require DTSC to incur significant costs to address. A bond of \$100,000 is a
18 conservative estimate of DTSC's expected attorney's fees and expenses.

19 **CONCLUSION**

20 Based on the above, the Court should deny Exide's preliminary injunction application and
21 discharge the order to show cause. But if the Court does grant a preliminary injunction, the Court
22 should include conditions to protect public health and the environment, and require Exide to post
23 a \$100,000 undertaking.

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Respectfully Submitted,

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